Once a member of a body is disqualified, that member may be legally required to participate only if an insufficient number of members remain to constitute a quorum. If a sufficient number of disinterested members exist to form a quorum, their mere absence does not make participation by the disqualified member legally required. (Cal. Code Regs., tit. 2, § 18708(c).)

In *In re Hudson* (1978) 4 FPPC Ops. 13, the FPPC outlined its interpretation of the legally-required-participation exception when multiple members of a body are disqualified. The FPPC concluded that if a quorum of the body were still available to participate in the making of the decision, the disqualifications must stand. If the disqualifications leave less than a quorum of the board's membership available to act, the legally-required-participation exception is triggered. However, unlike the common law rule of necessity, all disqualified members do not return to voting and participating status; rather, only the number of members needed to constitute a quorum are brought back to participate. (See also *In re Brown, supra*, 4 FPPC Ops. 19, 25, fn. 4; *Hamilton v.Town of Los Gatos* (1989) 213 Cal.App.3d 1050.) The process by which disqualified members may return for this limited role may be accomplished by a random drawing. (Cal. Code Regs., tit. 2, § 18708(c)(3).)

In *In re Hopkins* (1977) 3 FPPC Ops. 107, the FPPC concluded that the legally-required-participation exception could not be used to rehabilitate board members who were disqualified by virtue of the acceptance of gifts. In issuing this opinion, the FPPC was concerned that a person appearing before a board or commission could make lavish disqualifying gifts to all members of the board and still be able to gain a favorable decision when a quorum of the board members was rehabilitated. The prospect of rendering one's public agency helpless to act was intended to be a strong deterrent against the acceptance of disqualifying gifts.

K. REQUIREMENT TO ANNOUNCE CONFLICT AND LEAVE MEETING

Once a public official determines that he or she has a financial interest in a decision under the Act, necessitating disqualification, questions arise about the appropriate procedures to be followed. Both the Act and the FPPC regulations are silent with respect to the procedures to be followed by officers or employees who are not members of boards and commissions.

1. Public Officials Covered By Government Code Section 87105

For the very limited types of public officials who are covered by section 87200 and who also are subject to either the Brown Act or the Bagley-Keene Open Meeting Act, specific statutory requirements apply as set forth in detail in Government Code section 87105 and the FPPC's implementing regulation. The list of affected officials is as follows: city councils, boards of supervisors, planning commissions, certain retirement investment boards, Public Utilities Commission, Fair Political Practices Commission, Energy Commission and Coastal Commission.

Generally, when one of these officials is disqualified from participating in a decision because of a conflict of interest, the official must publically announce the specific financial interest that is the source of the disqualification. (Cal. Code Regs., tit. 2,

§ 18702.5(b)(1).)) After announcing the financial interest, the official usually must leave the room during any discussion or deliberations on the matter in question and the official may not participate in the decision or be counted for purposes of a quorum. (§ 87105; Cal. Code Regs., tit. 2, § 18702.5(b)(3).)

In the case of a closed session, the disqualified official still must publically declare his or her conflict in general terms but need not refer to a specific financial interest. (Cal. Code Regs., tit. 2, § 18702.5(c).) A disqualified official may not attend a closed session or obtain any confidential information from the closed session. (Cal. Code Regs., tit. 2, § 18702.5(c); *Hamilton v. Town of Los Gatos, supra*, 213 Cal.App.3d 1050.)

2. Public Officials Not Covered By Government Code Section 87105

A public official who is not covered by section 87105 (either because the official is not covered by section 87200 or because the official's position is not covered by the Brown Act or the Bagley-Keene Open Meeting Act) is not subject to these same rules. (Cal. Code Regs., tit. 2, §§ 18702.1(d) and 18702.5(a).) Neither the Act nor implementing regulation requires the officials to leave either the room or the dias. (See Cal. Code Regs., tit. 2, § 18702.1(a)(5), (b) and (c).) However, nothing in these regulations either authorizes or prohibits an agency by local rule or custom from requiring a disqualified member to step down from the dias and/or leave the meeting room. These disqualified officials still may not attend a closed session or obtain any confidential information from the closed session. (Cal. Code Regs., tit. 2, § 18702.1(c).)

All of the restrictions discussed above are separate and apart from the official's right to appear in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. (Cal. Code Regs., tit. 2, § 18702.4.)

L. LIMITATIONS ON AND REPORTABILITY OF GIFTS AND HONORARIA

1. Limits On Gifts

The Act limits the amount of gifts that can be received by specified officials and candidates from a single source during the calendar year to $250, adjusted biennially by the FPPC to reflect changes in the Consumer Price Index. (§ 89503(f); Cal. Code Regs., tit. 2, § 18940.2.) These limits are separate from the prohibition against receiving gifts totaling $10 or more a month, if provided by or arranged by a lobbyist. (§§ 86203-86204.) The covered officials and candidates, and corresponding gift limitations, effective as adjusted on January 1, 2003 (Cal. Code Regs., tit. 2, § 18940.2(b)), are set forth below:

- **Elected State or Local Officer or Candidate:** $340. (§ 89503(a) and (b); Cal. Code Regs., tit. 2, § 18940.2(a).)

- **State Board Member or State or Local Designated Employee:** $340 if the receipt of the gift would have to be reported as a gift or income from that source on the member's or designated employee's statement of economic interests (exception for part-time members of governing boards of public institutions of higher education unless that position is an elective office). (§ 89503(c) and (d); Cal. Code Regs., tit. 2, § 18940.2(a).) (For purposes of this pamphlet, the term "designated employee" refers to any officer, consultant or employee of the agency who participates in the making of decisions which foreseeably could have a material financial effect on any of his or her economic interests, since such persons are covered by the prohibition and should be included in the agency's conflict of interest code.)

- **Any Person Covered by Section 87200 Except Judges, but Including Judicial Candidates:** $340. (§ 89503(a) - (d).)

2. Limits On Honoraria

The Act prohibits the receipt of honoraria by elected state and local officers and candidates and by persons described in section 87200. (§ 89502(a) and (b).) Members of state boards and state or local designated employees are prohibited from receiving honoraria from any source of income that is required to be reported on the official's statement of economic interests. (§ 89502(c).) The prohibition does not apply to judges or non-elected, part-time members of governing boards of institutions of higher education. (§ 89502(d).) The prohibition does, however, apply to judicial candidates. (§ 89502(b).)

3. Reportability Of Gifts

Gifts aggregating $50 or more in a calendar year from a single source generally must be reported. (§ 87207.) A "gift" is anything of value that provides a personal benefit for which adequate consideration was not provided in return. Generally, the recipient of the benefit has the burden of demonstrating that any consideration paid was of equal or greater value than the benefit received. A gift is received when the recipient takes possession of the gift or exercises some direction or control over it. (Cal. Code Regs., tit. 2, § 18941(a).) However, for purposes of the disqualification requirement, when there is a promise to make a gift, the gift is received on the date on which it is offered so long as the recipient knows of the offer and ultimately receives the gift or exercises some direction or control over it. (Cal. Code Regs., tit. 2, § 18941(b).)

Both a source of a gift and any intermediary in the making of a gift must be disclosed. (§§ 87210, 87313; Cal. Code Regs., tit. 2, § 18945.3.) The gifts of an individual donor are aggregated with any gift by an entity in which the donor is more than a fifty percent (50%) owner. (Cal. Code Regs., tit. 2, § 18945.1.) When a gift is made by multiple donors, the group of donors must be generally identified, and any individual donors of $50 or more must be named. (Cal. Code Regs., tit. 2, § 18945.4.)

Under specified circumstances, a gift may be made to a public agency rather than to an individual. (Cal. Code Regs., tit. 2, §§ 18944.1, 18944.2; see Section E, subsection 3(b) of this chapter.)

4. Reportability Of Travel Expenses

Reportable travel expenses of an official or candidate should be reported on the special schedule created by the FPPC for that purpose. (§ 87207(c); Cal. Code Regs., tit. 2, 18950.1(a)(2)(B).)

5. Special Rules On Travel

A variety of special rules apply to the receipt of travel expenses. Depending on the surrounding circumstances, such expenses may be prohibited, limited, reportable, or totally exempt from coverage under the Act.

a. Totally Exempt

1. The following travel expenses, when provided to an official or candidate ("filer") who gives a speech, participates in a panel or seminar, or performs a similar service, are not payments and are not subject to any prohibition, limitation or reporting obligation (see Cal. Code Regs., tit. 2, § 18950.3):

   (i) Free admission, refreshments and non-cash nominal benefits provided to a filer during the entire event;

   (ii) actual intrastate transportation to and from the event;

   (iii) any necessary lodging and subsistence provided directly in connection with the speech, panel, seminar or service, including meals and beverages on the day of the activity.

   In other words, qualifying food, beverages, nominal benefits, accommodations and intrastate transportation in connection with giving a speech or appearing on a panel are not limited, prohibited, or reportable as gifts, income, or honoraria under the Act. In effect, these payments are invisible.

2. Travel expenses paid from campaign funds are not honoraria or gifts so long as they are expressly authorized by section 89513(a). (§ 89506(d)(1); Cal. Code Regs., tit. 2, §§ 18950.1(c) and 18950.4.)

3. Travel expenses paid for by an official's public agency do not constitute honoraria or gifts. (§ 89506(d)(2); Cal. Code Regs., tit. 2, § 18950.1(d).)

4. Travel expenses that are provided to a principal or employee of a business and which are reasonably necessary in connection with the operation of a bona fide business, trade or profession, that would qualify for a business deduction under the federal income tax laws (I.R.C. §§ 162 and 274) are not honoraria or gifts unless the predominant activity of the business is making speeches. (§ 89506(d)(3); Cal. Code Regs., tit. 2, § 18950.1(e).)

b. Reportable but Not Limited

The travel expenses discussed below are not subject to the gift and honoraria limits contained in the Act. However, such travel expenses may trigger the basic disqualification requirement contained in section 87100 (see *ante* under Sections A through J of this chapter). In addition, if the reporting threshold ($50) is reached, the expenses must be reported by the official or candidate on any applicable statement of economic interests.

Travel expenses are not subject to the limitations on gifts and honoraria if the travel is reasonably related to a legislative or governmental purpose or to an issue of public policy and either of the following apply:

1. The travel expenses are in connection with a speech given by an official or candidate; the lodging and subsistence is limited to the day before, the day of, and the day after the speech; and the travel is within the United States; or

2. the travel is provided by a government agency (foreign or domestic), an educational institution under Internal Revenue Code section 203, or a nonprofit organization which is tax exempt under Internal Revenue Code section 501(c)(3). (§ 89506(a); Cal. Code Regs., tit. 2, § 18950.1.)

Although not limited, these travel expenses are generally reportable pursuant to Gov. Code §§ 87207(c), 89506(c).

c. Both Reportable and Limited

To the extent that travel expenses are not exempt as described above, they are subject to both the disclosure requirement and the gift and honoraria limitations.

6. Definition Of Gift

As previously noted, a gift is anything of value that provides a personal benefit, either tangible or intangible, to a public official or candidate for which the donor has not received equal or greater consideration. (§ 82028(a).) Gifts frequently include money, food, transportation, accommodations, tickets, plaques, flowers and articles

for household, office, or recreational use. A gift also includes a rebate or discount in the cost of a product or service, unless the rebate or discount is made in the regular course of business to members of the public without regard to official status.

The Act and FPPC regulations contain a number of exemptions from the basic definition of a gift. Items that are exempt from the gift definition provisions are likewise exempt from any reporting or limitations placed on gifts. The rules providing for these exemptions are quite technical and complex. Below is a summary of the major exemptions from the definition of gift.

a. Informational Material

Material that serves primarily to convey information and is provided to assist the official or candidate in the performance of his or her official duties, or the elective office he or she seeks is exempt as "informational material." These materials may include books, magazines, maps, models, etc. (Cal. Code Regs., tit. 2, § 18942.1.) If the item is a scale model, pictorial representation, or map, and the value is $340 or more (this amount is adjusted biennially; see Section L, subsection 1, of this chapter), the recipient has the burden of demonstrating that the purpose of the material is to assist the recipient in performing his or her official duties in order for the item to be exempt. (Cal. Code Regs., tit. 2, § 18942.1(b).) Travel is not informational material, except that on-site tours or visits designed specifically for public officials or candidates are informational material. However, transportation to and from the site is not deemed informational material unless there are no commercial or other normal means of travel to the site (such as by private auto). (§ 82028(b)(1); Cal. Code Regs., tit. 2, § 18942.1(c).)

b. Returned Unused

Gifts are exempt if unused and returned within 30 days to the donor or donated to a government agency or nonprofit entity exempt from taxation under § 501(c)(3) of the Internal Revenue Code so long as a charitable tax deduction is not taken. (§ 82028(b)(2); Cal. Code Regs., tit. 2, § 18943(a).) Specific procedures for returning gifts in order to avoid disqualification are set forth in California Code of Regulations, title 2, section 18943(b). A recipient may negate a gift or may reduce a gift's value by reimbursing the donor for some or all of the gift within 30 days of receipt or acceptance of the gift. (Cal. Code Regs., tit. 2, § 18943(a)(4).) As a general rule, a recipient may not negate the receipt of a gift by turning the item over to another person or discarding it. (Cal. Code Regs., tit. 2, § 18941(a)(3).) (However, see different rule for passes and tickets *post* under Section L, subsection (7)(a) of this chapter.)

c. **Relatives**

Gifts from close family relatives (e.g. spouse, children, siblings, grandparents, aunts and uncles) are specified as exempt. (§ 82028(b)(3); Cal. Code Regs., tit. 2, § 18942(a)(3).)

d. **Campaign Contributions**

Bona fide campaign contributions are exempt. (§ 82028(b)(4); Cal. Code Regs., tit. 2, § 18942(a)(4).)

e. **Plaques or Awards**

A plaque or trophy that is personalized, for the recipient in question, and which has a value of less than $250 is exempt. (§ 82028(b)(6); Cal. Code Regs., tit. 2, § 18942(a)(6).)

f. **Home Hospitality**

Hospitality provided by an individual in his or her home is not a gift when the donor or a member of his or her family is present. (Cal. Code Regs., tit. 2, § 18942(a)(7).)

g. **Exchange of Gifts**

Gifts exchanged between an official or candidate and another individual, other than a lobbyist, in connection with birthdays, Christmas, other holidays or similar events are exempt, so long as the gifts exchanged are not substantially disproportionate in value. (Cal. Code Regs., tit. 2, § 18942(a)(8).)

h. **Devise or Inheritance**

Section 82028(b)(5); California Code of Regulations, title 2, section 18942(a)(5).

7. **Valuation Of Gifts**

Gifts are valued as of the date they are received or promised to the recipient. (Cal. Code Regs., tit. 2, §§ 18941(a) and 18946(a).) The value is the fair market value of the gift on that date. If a gift is unique, the value of the gift is the cost to the donor if the cost is known or ascertainable to the recipient. In the absence of such knowledge, the recipient must exercise his or her best judgment in reaching a reasonable approximation of the gift's value. (Cal. Code Regs., tit. 2, § 18946(b).)

a. Passes and Tickets

A ticket providing a single admission to an event or facility, such as a game or theater performance, is valued at the price the ticket is offered to the public. However, the pass or ticket has no value unless it is either used or transferred to another. (Cal. Code Regs., tit. 2, § 18946.1(a).)

A pass or series of tickets which permits repeated admissions to events or facilities is valued as follows: For purposes of disclosure and gift limits the value is based on actual use by the recipient and the recipient's guests, and any possible use by transferees of the pass or tickets. For purposes of disqualification, the value is the actual use by the recipient and the recipient's guests, and any possible use by transferees through the date of the decision in question, plus the maximum reasonable value of the usage following the date of the decision. If this type of pass or tickets is returned prior to the date of the decision, the value is determined by actual use and the value of any retained tickets for future events. (Cal. Code Regs., tit. 2, § 18946.1(b).)

b. Testimonial Dinners

When an official or candidate is honored at a testimonial dinner or similar event, other than a campaign event, the recipient is deemed to have received a gift in the amount of the pro rata share of the cost of the event plus the value of any specific tangible gifts received by the individual. (Cal. Code Regs., tit. 2, § 18946.2.)

c. Wedding Gifts

Generally, wedding gifts are considered to be made to both spouses equally. Therefore, one-half of the gift is attributable to each spouse. If a wedding gift is particularly adaptable to one spouse or intended exclusively for the use of one spouse the gift shall be allocated in whole to that spouse. (Cal. Code Regs., tit. 2, § 18946.3.) Although wedding gifts are exempt from the gift limit, they are reportable and may trigger disqualification. (Cal. Code Regs., tit. 2. § 18942(b)(2)). Moreover, this exemption does not negate the lobbyist gift limit of Government Code section 86203. (Gov. Code § 89503(e)(2) and (g).)

d. Tickets to Political and Nonprofit Fundraisers

Tickets to political fundraisers or fundraisers conducted by nonprofit organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code have no value. The value of tickets to other nonprofit, tax exempt organization fundraisers is the face value minus the value of any donations stated on the ticket, or where no such donation is set forth, the value is the fair market value of food, beverage, or other tangible benefits provided to each attendee. (Cal. Code Regs., tit. 2, § 18946.4.)

e. Prizes and Awards

Generally, prizes and awards are valued at their fair market value. However, a prize or award won in a bona fide competition unrelated to the recipient's status as an official or candidate is not a gift but is income and may be reportable, depending upon the source and amount. (Cal. Code Regs., tit. 2, § 18946.5.)

8. Definition Of Honoraria

In general, an honorarium is a payment made in consideration for any speech given, article published, or attendance at a public or private conference, convention, meeting, social event, meal, or similar gathering. (§ 89501.) However, the definition excludes certain travel-related payments. For information concerning limitations on food, transportation, lodging, and subsistence, see Section K, subsection 5, of this chapter.

A speech includes virtually any type of oral presentation including participation as a panel member. Comedic, dramatic, musical, or artistic performances do not constitute the making of a speech for purposes of the honoraria limitation. (Cal. Code Regs., tit. 2, § 18931.1.)

For purposes of the honoraria limitation, an "article published" refers to a non-fiction written work which is published in a periodical, newsletter, or similar document. An article published in connection with a bona fide business, trade, or profession is exempt from the prohibition. (Cal. Code Regs., tit. 2, § 18931.2.) (A bona fide business is defined in Cal. Code Regs., tit. 2, § 18932.1.) An individual is deemed to have received payment in connection with a published article if he or she receives payment for drafting any portion of the article, or is identified as an author or contributor to the work. (Cal. Code Regs., tit. 2, § 18931.2.)

a. Earned Income

Honoraria does not include earned income for personal services if both of the following apply:

- The services are provided in connection with an individual's business (including nonprofit entities) or employment in a bona fide business, trade, or profession (other than speech making), (§ 89501(b); Cal. Code Regs., tit. 2. § 18932(a)(1) and (b)); and

- The services are customarily rendered as a part of the business. (Cal. Code Regs., tit. 2, § 18932(a)(2).)

b. Teaching Profession

For purposes of the honoraria limitations, an individual is presumed to be participating in the profession of teaching if any of the following apply:

- The individual is under contract or employed to teach at a school, college, or university which is accredited, approved, or authorized as an educational institution by the State of California, another state, the federal government or an independent accrediting organization. (Cal. Code Regs., tit. 2, § 18932.2(a).)

- The individual is paid to teach a course which is presented to maintain or improve professional skills and knowledge and where the course provides continuing education credits for members of the profession. (Cal. Code Regs., tit. 2 § 18932.2(b).)

- The individual is paid for teaching individuals who are enrolled in an examination preparation program such as a State Bar examination review course. (Cal. Code Regs., tit. 2, § 18932.2(c).)

c. Return or Donation of Honoraria

The limitations on honoraria do not apply if, within 30 days of the receipt of the honorarium, the honorarium is returned unused or it is donated to the general fund of the agency in question. If the payment is not money and cannot be contributed to the general fund, the recipient may reimburse the donor for the value or use of the honorarium. (§ 89501(b)(2); Cal. Code Regs., tit. 2, § 18933.)

Donations made to a charity by a third person in return for a speech by an individual do not constitute honoraria to the speaker pursuant to California Code of Regulations, title 2, section 18932.5, if all of the following conditions apply:

- The donation is made directly to the charity;

- the speaker does not make the donation a condition for making the speech or appearance;

- the donation is not claimed as a tax exemption by the speaker;

- the donation will not have a foreseeable material financial effect on the speaker or the speaker's immediate family; and

- the speaker is not identified to the recipient charity in connection with the donation.

Honoraria which is so donated or reimbursed need not be reported by the speech maker.

M. SPECIAL RULES FOR ELECTED STATE OFFICERS

Because section 87102 exempts elected state officers from the Act's remedies for violation of section 87100, special disqualification prohibitions have been created for these officials. (§§ 87102.5-87102.8.) With respect to legislators, these prohibitions generally are imposed where legislators have specified interests in non-general legislation, i.e., legislation which affects only a small number of persons and does not affect the general public. (§ 87102.6.) Members of the Legislature are also prohibited from participating in, or using their official position to influence state government decisions in which the member has a financial interest, and which do not involve legislation. (§ 87102.8.)

Elected state officers are prohibited from participating in decisions of their agency where the decision would affect a lobbyist employer which has provided compensation to that officer for appearing before a local board or agency, and where the decision will not affect the general public. (§§ 87102.5(a) and (b); 87102.8(b).) With respect to legislators, this prohibition applies to persons who are not lobbyist employers as well. (§ 87102.5(a)(7).)

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II.

ECONOMIC DISCLOSURE PROVISIONS UNDER THE POLITICAL REFORM ACT OF 1974

Government Code Section 87200 Et Seq.*

A. OVERVIEW

In addition to the requirement that public officials disqualify themselves from conflict-of-interest situations, public officials whose decisions could affect their economic interests are required under the Political Reform Act of 1974 (hereinafter "Act") to file economic interests disclosure statements which are public records. Disclosure serves the two-fold purpose of making assets and income of public officials a matter of public record and reminding those public officials of their economic interests. By focusing their attention on their interests, officials will be able to identify conflict-of-interest situations and disqualify themselves from participating in decisions when appropriate. Moreover, questions from the media and interested citizens often aid in the public discussion of conflict-of-interest issues and assist in their resolution.

Articles 2 and 3 of Chapter 7 of the Act deal with disclosure of economic interests by public officials. These provisions were challenged in the case of *Hays v. Wood* (1979) 25 Cal.3d 772, as unconstitutionally overbroad and as violative of privacy rights. The court rejected these claims holding that the disclosure scheme established in the Act was not overbroad and that any infringements on the official's right to privacy or associational freedom was justified by the limited disclosure needed to prevent a conflict of interest. (See also, *Fair Political Practices Commission v. Superior Court* (1979) 25 Cal.3d 33; *County of Nevada v. MacMillen* (1974) 11 Cal.3d 662.)

B. PERSONS COVERED

The Act provides that all state and local officials, who foreseeably may materially affect private economic interests through the exercise of their public duties, must disclose such interests. Some persons are required to file disclosure statements because of the positions they hold and others are required to file because of their job duties. The disclosure requirements for constitutional officers, members of the Legislature, county supervisors, city council members, mayors, judges, and other high ranking officials are set forth in Government Code sections 87200-87210.[2] All other officials who make or participate in the making of decisions are covered by conflict of interest codes adopted pursuant to Government Code sections 87300-87313. The promulgation and administration of conflict of interest codes will be discussed in Section F of this chapter. Under Government Code section 87200 et seq., high ranking state and local officials must disclose all income,

*Selected statutory materials appear in appendix B (at p. 127).

[2]All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

gifts, interests in real property, and investments located in or doing business in their jurisdiction. The disclosure requirements for all other officials depend upon the power of the individual by virtue of his or her official position to affect financial interests.

C. STATEMENTS OF ECONOMIC INTERESTS

Public officials disclose their private economic interests in a document entitled "Statement of Economic Interests." (Form 700.) (For information concerning public access to these statements, see Section E of this chapter.) There are three basic types of statements of economic interests: assuming office; annual; and leaving office. As the names of these statements suggest, public officials must report their economic interests when they begin public service, annually thereafter, and when they leave service. In addition, candidates for the elective offices specified in section 87200 et seq., (other than appellate or supreme court justices), must file candidate statements. (§ 87201.) The time for filing candidate statements is set forth in section 87201, for those subject to its provisions, and in conflict of interest codes for all other candidates.

D. CONTENT OF STATEMENTS

In general, an official's statement of economic interests discloses the types of interests in real property, investments, business positions, and sources of income and gifts which he or she potentially could affect in his or her official capacity. (For a brief discussion of these economic interests, see Chapter I, Sections E and L. For specific instructions, see the disclosure forms and manual of the FPPC or contact the FPPC directly.)

Except for the disclosure of gifts, officials need not disclose the specific amount of their economic interests. They are merely required to mark the appropriate value range applicable to their economic interests, e.g., less than $2,000; $2,000 to $10,000; $10,000 to $100,000; or $100,000 or more. By merely indicating the applicable value range, the public is alerted at least partially to any potential conflict of interest, and the official's privacy is safeguarded from those who are merely curious about the degree of the official's wealth. (*City of Carmel-By-The Sea v. Young* (1970) 2 Cal.3d 259.)

If income is received or an interest in real property or investment is held at any time during the period covered by the statement, it must be disclosed. Officials are required to report all interests in real property and investments held by their spouses and dependent children and their community property interest in the income of their spouses. (§§ 82030, 82033, 82034.) Officials who own a 10 percent or greater interest in a business entity must disclose the sources of income to, and the interests in real property and investments held by, the business entity if the applicable prorated dollar thresholds are satisfied. (§§ 82030, 82033, 82034.) Similar disclosure provisions exist with respect to trusts. (See Cal. Code Regs., tit. 2, § 18234.) Assets held by a truly blind trust that meets the standards contained in FPPC regulations are not disclosable. (See Cal. Code Regs., tit. 2, § 18235.)

Except for gifts, the disclosure of income, interests in real property, business positions and investments need not be reported if there is not a sufficient connection between the official's economic interest and the jurisdiction of the official's office or agency. Thus, an interest in real property must be disclosed only if it is within the official's jurisdiction or within two miles of it. (§§ 82033, 82035.) Similarly, a source of income, or a business entity in which an official has an investment or holds a business position, must be reported only if the source or entity is located in the jurisdiction, is doing business in the jurisdiction, is planning to do business in the jurisdiction, or has done business within the jurisdiction during the past two years. Once again, the purpose for this limitation is to protect the official's privacy in financial affairs that are beyond the official's power to affect. (See, *City of Carmel-by-the-Sea v. Young, supra,* 2 Cal.3d 259.) In reporting income, the appropriate value range is determined by the gross amount received, rather than the net. (*In re Carey* (1977) 3 FPPC Ops. 99.) Therefore, an official may have reportable income even when he or she sells a car, land, or an investment at a loss.

For a discussion of gifts, including definitions, valuation and reporting, see Chapter I, Section E, subsection 4; Chapter I, Section L, specifically subsections 3 through 8.

E. PUBLIC ACCESS TO STATEMENTS OF ECONOMIC INTERESTS

Every official covered by section 87200 or a conflict of interest code must file a statement of economic interests with his or her agency unless another filing officer is specifically designated. Statements of certain officials are forwarded to the FPPC by their respective agencies; these include constitutional officers, members of the Legislature, county supervisors, mayors, city council members, planning commissioners, city managers, city attorneys, and judges.

All statements of economic interests are available for public inspection during regular business hours. Persons wishing to examine statements may not be required to identify themselves and may only be charged a maximum of ten cents ($0.10) per page for copies of statements. For a statement five years old, a $5.00 retrieval fee may be added. (§ 81008.)

F. CONTENTS AND PROMULGATION OF CONFLICT OF INTEREST CODES

Every agency taking actions that foreseeably may materially affect economic interests must adopt a conflict of interest code for its employees. A conflict of interest code lists those employees or officers who have disclosure obligations (designated employees) and prescribes the types of interests which must be disclosed by such officials (disclosure categories). For purposes of this pamphlet, the term "designated employee" refers to any officer, consultant or employee of the agency who participates in the making of decisions which foreseeably could have a material financial effect on any of his or her economic interests. Such persons are covered by the disqualification prohibition and should be included in the agency's conflict of interest code. Employees who perform merely ministerial or manual tasks, or members of advisory non-decisionmaking boards, as defined by FPPC regulations, are not subject to a conflict of interest code. The public is entitled to participate in the code adoption process as provided for in section 87311 and the applicable open meeting law (for local

government bodies, The Brown Act, contained in Gov. Code, § 54950 et seq.; for state bodies, The Bagley-Keene Open Meeting Act, contained in Gov. Code, § 11120 et seq.). You may contact the Office of the Attorney General for information on the applicable open meeting law. For more information about the promulgation and contents of conflict of interest codes, contact the FPPC. The FPPC can provide sample lists of designated employees, model disclosure categories, and other aids.

When a conflict of interest code is adopted by an agency, it must be submitted to the "code reviewing body" for approval. As a general rule, the code reviewing body is an agency independent of the promulgating agency, e.g., FPPC for state departments; or city council for city departments. Once the conflict of interest code is approved by the code reviewing body, it must be reviewed periodically to determine whether changed circumstances necessitate its amendment. (§ 87306(a).) A review must occur at least once every two years. (§§ 87306(b); 87306.5.) In particular, the list of designated employees and the disclosure categories should be reflective of the agency's current organization and ability to affect economic interests. (§ 87306(a).) If the agency fails to adopt a conflict of interest code or to initiate necessary amendments, a resident of the jurisdiction can compel such amendments. (§§ 87305; 87308.)

G. PENALTIES AND ENFORCEMENT

Sections 87200-87313 are a part of the Political Reform Act. For a discussion of penalties and enforcement under the Act, see Chapter V of this pamphlet.

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III.

CONFLICTS OF INTEREST AND CAMPAIGN CONTRIBUTIONS

Government Code Section 84308*

A. OVERVIEW

As previously noted in Chapter I, discussing financial conflicts of interest under the Political Reform Act of 1974 (hereinafter "Act"), campaign contributions are not a basis for disqualification by directly elected public officials. (See §§ 82028(a)(4), 82030(b)(1)[3]; *Woodland Hills Residents Assoc. v. City Council of the City of Los Angeles* (1980) 26 Cal.3d 938.) However, because of the increased concern about the link between campaign contributions and alleged conflict-of-interest situations, the Legislature enacted section 84308 in 1982.

B. THE BASIC PROHIBITION

Briefly stated, Government Code section 84308 provides the following:

(1) The law applies to proceedings on licenses, permits, and other entitlements for use pending before certain state and local boards and agencies.

(2) Covered officials are prohibited from receiving or soliciting campaign contributions of more than $250 from parties or other financially interested persons during the pendency of the proceeding and for three months after its conclusion. Note: Local laws may impose limits on campaign contributions that are lower than $250. (§ 85703 et seq.)

(3) Covered officials must disqualify themselves from participating in the proceeding if they have received contributions of more than $250 during the previous 12 months from a party or a person who is financially interested in the outcome of the proceeding.

(4) At the time parties initiate proceedings, they must list all contributions to covered officials within the previous 12 months.

(5) The law expressly exempts directly elected state and local officials except when they serve in a capacity other than that for which they were directly elected.

*Selected statutory materials appear in appendix E (at p. 162).

[3]All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

A more comprehensive description of the provisions of section 84308 is set forth below. If you have specific questions, you should consult the actual wording of the statute, and the regulations of the Fair Political Practices Commission (hereinafter, "FPPC").

C. PERSONS COVERED

The law applies to two types of individuals: covered officials and interested persons.

Covered officials typically include state and local agency heads and members of boards and commissions. (§§ 84308(a)(3) and 84308(a)(4); Cal. Code Regs., tit. 2, § 18438.1.) Alternates to elected or appointed board members and candidates for elective office in an agency also are covered. (§ 84308(a)(4); Cal. Code Regs., tit. 2, § 18438.1(c).) Covered officials do not include city councils, county boards of supervisors, the Legislature, constitutional officers, the Board of Equalization, judges and directly elected boards and commissions. However, these officials are not exempt from coverage when they sit as appointed members of other boards or bodies (e.g., joint powers agencies, regional government bodies, etc.). (§ 84308(a)(3), (a)(4); Cal. Code Regs., tit. 2, § 18438.1.)

Interested persons refers to persons who are financially interested in the outcome of specified proceedings (e.g., parties and participants). Parties (e.g., applicants or subjects of the proceeding) are always presumed to be financially interested in the outcome. In addition, persons or entities that satisfy both of the following criteria are financially interested and are called "participants": (1) they foreseeably would be materially financially affected by the outcome of the decision as those terms are defined in Government Code section 87100 et seq.; and (2) they have acted to influence the decision through direct contacts with the officials or their staffs. (§ 84308(a)(1), (a)(2), (b) and (c); Cal. Code Regs., tit. 2, § 18438.4.)

When a closely held corporation is a party or participant in a proceeding, the requirements of the law apply to the majority shareholder. (§ 84308(d).)

D. AGENTS

Agents of parties and participants are subject to the same prohibitions and requirements as their principals. (§ 84308(b), (c).) A person is an agent under section 84308 if he or she represents an interested person in connection with the covered proceeding. (Cal. Code Regs., tit. 2, § 18438.3(a).) If an individual acting as an agent is also acting as an employee or member of a law, architectural, engineering, or consulting firm, both the individual and the firm are considered agents. (Cal. Code Regs., tit. 2, § 18438.3(a).)

To determine whether the threshold of more than $250 for triggering the contribution prohibition or disqualification requirement has been reached, contributions made within the preceding 12 months from parties or participants are aggregated with those of their agents. Contributions from an individual agent include contributions from that agent's firm but do not include contributions from other individual partners or members of the firm unless such contributions are reimbursed by the firm. (Cal. Code Regs., tit. 2, § 18438.3(b).)

E. PROCEEDINGS COVERED

The law covers proceedings involving a license, permit, or other entitlement for use. These terms include all business, professional, trade and land use licenses and permits, and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises. (§ 84308(a)(5).) The law covers conditional use permits, zoning variances, rezoning decisions, tentative subdivision and parcel maps, and consulting contracts (but does not apply to general land use plans or general building and development standards). (*City of Agoura Hills v. Local Agency Formation Com.* (1988) 198 Cal.App.3d 480; *In re Curiel* (1983) 8 FPPC Ops. 1.) Ministerial decisions also are not covered. (Cal. Code Regs., tit. 2, § 18438.2(b)(3).)

F. REQUIRED CONDUCT

Section 84308 imposes various requirements – in connection with the making or receipt of campaign contributions – on covered officials, parties, and participants involved in specified proceedings. As used in section 84308, the term "contribution" refers to money, goods or services provided in connection with federal, state, or local political campaigns. (§ 84308(a)(6).)

1. Disclosure

At the time parties initiate proceedings, they must disclose on the record of the proceeding all covered officials to whom they, or their agents, made contributions of more than $250 during the previous 12 months. (§ 84308(d).) Similarly, officials, must, at the beginning of the hearing, disclose on the record of the proceeding any party or participant who has contributed more than $250 during the previous 12 months. (§ 84308(c); Cal. Code Regs., tit. 2, § 18438.8.) If there is no public hearing, the disclosure must be entered on the written record of the proceeding. (Cal. Code Regs., tit. 2, § 18438.8.) As will be discussed subsequently, receipt of such contributions may necessitate the disqualification of the official from the decisionmaking process.

2. Prohibition On Contributions

During the pendency of the proceeding involving the license, permit, or entitlement for use and for a period of three months thereafter, parties and participants are prohibited from making contributions of more than $250 to covered officials involved in the proceedings. (§ 84308(d).) Likewise, covered officials are prohibited from soliciting or receiving such contributions from parties or from participants who they know or have reason to know are financially interested in the outcome of the proceeding. (§ 84308(b).) Covered officials also are prohibited from soliciting, receiving, or directing contributions on behalf of another person or on behalf of a committee. (§ 84308(b).) (But see, Cal. Code Regs., tit. 2, § 18438.6 for exceptions.)

3. Disqualification

If, prior to making a decision in a covered proceeding, more than $250 in contributions has been willfully or knowingly received by an official from a party or their agent during the previous 12 months, the official must disqualify himself or herself from participating in the proceeding. (§ 84308(c).) A similar prohibition exists with respect to contributions received from a participant, or his or her agent, if the official knows or has reason to know that the participant is financially interested in the outcome of the proceeding. (§ 84308(c); Cal. Code Regs., tit. 2 § 18438.7.) If an official returns the contribution (or that portion which is over $250) within 30 days from the time he or she knows or has reason to know of the contribution and the proceeding, then disqualification is not required. (§ 84308(c).)

4. Knowledge

In order for the contribution prohibition and disqualification requirement to apply, the covered official must have the requisite knowledge of (1) the contribution and (2) the fact that the source of the contribution is financially interested in the proceeding. By regulation, the FPPC provides that the knowledge requirement is satisfied with respect to the contribution when either the covered official has actual knowledge of it or it has been disclosed on the record of the proceeding. (Cal. Code Regs., tit. 2, § 18438.7(c).) With respect to the official's knowledge of the financial interest of the source of the contribution, parties are conclusively presumed to be financially interested. (§ 84308(a)(1), (b), (c); Cal. Code Regs., tit. 2, § 18438.7(a)(1).) With respect to participants, the covered official's knowledge requirement is satisfied if the participant reveals facts to the agency that make his or her financial interest apparent. (§ 84308(a)(2), (b), (c); Cal. Code Regs., tit. 2, § 18438.7(a)(2).)

G. PENALTIES AND ENFORCEMENT

Section 84308 is a part of the Political Reform Act. For a discussion of penalties and enforcement provisions under the Act, see Chapter V of this pamphlet.

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IV.

LIMITATIONS ON FORMER STATE OFFICIALS APPEARING BEFORE STATE GOVERNMENT AGENCIES

Government Code Section 87400 Et Seq.*

A. OVERVIEW

Historically, there has been a regular flow of personnel between government and the private sector. Sometimes, individuals from the private sector enter government for a short tenure of service and then return to their private enterprise occupations. Other times, individuals with longstanding government service who have developed expertise choose to leave government service and join the private sector. In still other instances, elected officers retire or are defeated and return to private industry.

The Political Reform Act of 1974 (hereinafter, the "Act") includes Government Code section 87400 et seq., commonly known as the "Revolving Door Prohibition."[4] The Legislature also has enacted categorical restrictions on post-government employment. Section 87406 places restrictions on former government officials from contacting specified government agencies. These sections constitute the only general state law regulating the activity of former government officials who enter the private sector. (But see Pub. Contract Code, § 10411, for additional specific prohibitions.)

In addition, the Act prohibits public officials from participating in government decisions relating to any person with whom the official is negotiating concerning future employment. (§ 87407.)

If a former local government official wishes to influence his or her former agency, the official should consult local laws and rules to determine if there are limitations on his or her activities. Special provisions for air pollution control districts appear in section 87406.1.

B. LIFETIME RESTRICTIONS

1. The Basic Prohibition

The basic prohibition contained in section 87400 et seq. provides that: (1) no former state administrative official, (2) shall for compensation act as agent or attorney for any person other than the State of California, (3) before any court or state administrative agency, (4) in a judicial or quasi-judicial proceeding if previously the

*Selected statutory materials appear in appendix F (at p. 163).

[4]All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

official personally and substantially participated in the proceeding in his or her official capacity. (See *In re Lucas* (2000) 14 FPPC Ops. 15.)

If the elements of the prohibition are found to be present, a former state administrative official is forever banned from acting as an agent or attorney in a covered proceeding or from assisting another to so act.

2. State Administrative Official

State administrative officials include every member, officer, employee or consultant of a state administrative agency who, as part of his or her official responsibilities, engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity. (§ 87400(b).) State administrative agencies include every office, department, division, bureau, board and commission of state government, but do not include the Legislature, the courts or any agency in the judicial branch. (§ 87400(a).)

3. Compensation For Representation As Agent Or Attorney

The statutory prohibition extends only to former state administrative officials who, for compensation, represent someone else as agent or attorney. (§ 87401, 87402.) Former officials who provide representation without compensation are not covered by the prohibition. (Cal. Code Regs., tit. 2, § 18741.1(a)(2).) Representing an individual as part of one's employment constitutes receiving compensation for such representation. A firm which has as one of its partners a former administrative official generally may not represent persons in covered proceedings, because the official ultimately will benefit directly or indirectly from the compensation paid to the firm for such representation. However, where a former administrative official merely shares office space and some other overhead expenses with another attorney, that attorney would not be prohibited from handling such cases so long as the former administrative official were in no way involved in fee splitting or the representation. (*Zatopa* Advice Letter, No. A-82-095.)

The statute specifies the types of conduct which constitute prohibited representation of another in a covered proceeding (e.g., § 87402). It prohibits any formal or informal appearance or any written or oral communication with an intent to influence the covered proceeding. The prohibition on representation applies only to proceedings in which the State of California is a party or in which it has a direct or substantial interest. (§ 87401(a), (b); Cal. Code Regs., tit. 2, § 18741.1(a)(3).) In addition, the statute prohibits former administrative officials, for compensation, from aiding or assisting another to represent a person in a covered proceeding. (§ 87402; Cal. Code Regs., tit. 2, § 18741.1(a)(2).) Thus, if a former administrative official would be prohibited from personally acting as the client's representative, he or she is also prohibited, for compensation, from aiding or assisting another in such representation.

4. Court Or Quasi-Judicial Proceeding

It is important to note that the statute applies only to judicial, quasi-judicial or other proceedings involving specific parties before a court or administrative agency (§ 87400(c); *Xander* Advice Letter, No. A-86-162; *Berrigan* Advice Letter, No. A-86-045.) Thus, quasi-legislative proceedings of an agency for the purposes of adopting general regulations do not trigger the prohibition. (*Nutter* Advice Letter, No. A-86-042; *Swoap* Advice Letter, No. A-86-199.) Participation in a lawsuit, an administrative enforcement action under section 11500 of the Government Code, or application proceedings are specifically covered. (§ 87400(c).) Any other proceeding which involves a controversy or ruling concerning specific parties also is covered. (§ 87400(c).)

5. Previous Participation

Once it has been determined that a former administrative official is prepared to act as an agent or attorney for another in a court or in an administrative proceeding, it must be determined whether the former official participated in the proceeding during his or her official tenure. (*In re Lucas,su pra,* 14 FPPC Ops. 15; *Anderson* Advice Letter, No. A-86-324; *Petrillo* Advice Letter, No. A-85-255.) If so, the elements of the prohibition are complete and the former administrative official is prevented from acting in a representative capacity. (§ 87401.) A former administrative official is deemed to have participated in a proceeding only if he or she were personally and substantially involved in some aspect. (§ 87400(d); *In re Lucas, supra,* 14 FPPC Ops. 15; *Brown* Advice Letter, No. A-91-033.) The statute specifically covers personal and substantial participation in a decision, the approval or disapproval of a decision, the making of a formal recommendation, and the rendering of substantial advice. In addition, involvement in an investigation or the use of confidential information qualifies as participation under the statute. (§ 87400(d).) However, the statute specifically exempts from coverage the rendering of legal advice to departmental or agency staff which does not involve specific parties.

Unless covered by a specific exemption, a former administrative official who participated in a covered proceeding in his or her official capacity, is forever banned from receiving compensation for acting as an agent or attorney in that proceeding, or from assisting another to do so. Section 87403 provides several limited exceptions to this general prohibition.

The statute does not prevent a former administrative official from making a statement which is based on his or her own special knowledge of the area, provided that the official does not receive any compensation, other than witness fees as set forth by law or regulation. (§ 87403(a).) The statute also exempts communications made solely for the purpose of providing information if the court or administrative agency to which the communication is directed first makes specified findings. (§ 87403(b).) The court or administrative agency must find that the former administrative official has outstanding and otherwise unavailable qualifications, that the proceeding in question requires such qualifications, and that the public interest would be served by

participation of the former official. Lastly, where a court or administrative agency has made a final decision but has retained jurisdiction over the matter, it may permit an appearance or communication from the former administrative official if the agency of former employment gives its consent by determining that the former administrative official left office at least five years previously and the public interest would not be harmed by the appearance or communication.

6. Enforcement And Disqualification

Upon petition of any interested person, or party, the court or administrative agency may act to enforce the terms of the statutory prohibition. After notice to the former administrative official, the court or administrative agency may exclude him or her from further participation or from assisting or counseling any other participant. (§ 87404.) In addition, the administrative, civil and criminal sanctions available for enforcement of the Act apply to section 87400 et seq. (See Chapter V of this pamphlet.)

C. ONE-YEAR PROHIBITION

1. The Basic Prohibition

The restrictions prohibit the following former officials from accepting compensation to act as the agent, attorney or representative of another person for purposes of influencing specified government agencies through oral or written communications.

- With respect to members of the Legislature, the law imposes a one-year prohibition on communications with members of the Legislature, members of any legislative committee or subcommittee, or any officer or employee of the Legislature for the purpose of influencing legislative action. (§ 87406(b).)

- With respect to an elected state officer (excluding legislators), the law imposes a one-year prohibition on communications with any state administrative agency, for the purpose of influencing any administrative action or any action or proceeding concerning a permit, license, grant or contract, or the sale or purchase of goods or property. (§ 87406(c).)

- With respect to a state designated employee or member of a state body, the law imposes a one-year prohibition on communications with any state administrative agency – which either employed or was represented by the former official during the last 12 months of his or her government service – for the purpose of influencing: any administrative or legislative action; any action or proceeding concerning a permit, license, grant or contract; or the sale or purchase of goods or property. (§ 87406(d)(1).) (For a discussion of designated employees, see Chapter II, Section F.)

Appearances before a court, a state administrative law judge, or the Workers Compensation Appeals Board are not subject to the prohibitions of section 87406. Also, uncompensated appearances are not subject to the prohibition. The prohibition is not applicable to officials who transfer between state agencies (§ 87406(e); Cal. Code Regs., tit. 2, § 18741.1(a)(2)), and designated employees of the Legislature (§§ 87406(d) and 87400(a)). The prohibitions are also inapplicable to a former state official who holds a local elective office when the appearance or communication is made on behalf of the local agency. (87406(e)(2).)

2. Administrative Or Legislative Action

"Administrative action" means the proposal, drafting, development, consideration, amendment, enactment or defeat of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding. (§ 82002.) "Legislative action" means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination, or other matter by the Legislature or by either house or any committee thereof, or by a member or employee of the Legislature acting in his or her official capacity. "Legislative action" also means the action of the Governor in approving or vetoing any bill. (§ 82037.)

D. JOB SEEKING BY GOVERNMENT OFFICIALS

Prior to leaving government office or employment, the Act prohibits all public officials from making, participating in the making or using their official position to influence the making of government decisions directly relating to any person with whom they are negotiating, or have any arrangement, concerning prospective employment. (§ 87407; Cal. Code Regs., tit. 2, § 18747.) Previously, this prohibition applied to a more limited list of state officials.

E. GOVERNMENT CODE SECTION 87450

In addition to the disqualification requirements previously discussed in Section I, state administrative officials as defined in section 87400 are disqualified from making, participating in, or using their official position to influence governmental decisions that directly relate to any contract where the official knows or has reason to know that any party to the contract is a person with whom the official, or any member of his or her immediate family, has engaged in any business transaction on terms not available to the public, regarding any investment or interest in real property, or the rendering of any goods or services totaling in value $1,000 or more within the prior twelve months.

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V.

PENALTIES, ENFORCEMENT AND PROSPECTIVE ADVICE UNDER THE POLITICAL REFORM ACT OF 1974

Government Code Sections 83114-83123 and 91000 Et Seq.

A. PENALTIES AND ENFORCEMENT

The Political Reform Act of 1974 (hereinafter, "Act") provides administrative, civil and criminal penalties for its violation. In past years, the Fair Political Practices Commission (hereinafter, "FPPC") and local district attorneys have brought numerous enforcement actions that have resulted in millions of dollars of fines. The Attorney General and the district attorney have concurrent jurisdiction over criminal violations at the state level. (§ 91001(a).)[5] If you have a question about a potential violation of the Act you should contact the FPPC's enforcement division (428 J Street, 7th Floor, Sacramento, CA 95814, (916) 322-6441 or 1-800-561-1861) or your local district attorney. You can also utilize the FPPC's website at: <http://www.fppc.ca.gov>.

Civil prosecution may be pursued by various persons, including residents of the jurisdiction, depending upon the circumstances. (§ 91001 et seq.)

Administrative penalties are levied by the FPPC after a hearing or stipulation. (§ 83116.) Administrative penalties include a $5,000 fine per violation, cease and desist orders, and orders to file reports, etc. (§ 83116.) The FPPC has the authority to bring administrative actions against both state and local officials. (§ 83123; see also *McCauley v.B FC Direct Marketing* (1993) 16 Cal.App.4th 1262, 1268-69 [certain provisions of the Act can be addressed only by an FPPC administrative action].)

Injunctive relief may be sought by the civil prosecutor or any person residing in the official's jurisdiction. (§ 91003(a).) The court, in its own discretion, may require a plaintiff to file a complaint with the FPPC prior to seeking injunctive relief. In the event the action would not have been taken but for the conflict of interest, the court is empowered to void the decision. (§ 91003(b); *Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983.) The civil prosecutor or any resident of the jurisdiction also may seek civil damages for violations of the Act. (§§ 91004 and 91005.) A plaintiff who prevails in an action brought pursuant to this section may be awarded attorney's fees. (§ 91012.) Such fees are awarded pursuant to the standards set forth in Code of Civil Procedure section 1021.5, including the use of a multiplier. (*Thirteen Committee v. Weinreb* (1985) 168 Cal.App.3d 528; *Downey Cares v. Downey Community Development Com.*,*supr a*, 196 Cal.App.3d at p. 997.) A prevailing defendant, however, may be awarded attorney's fees only if the plaintiff's suit is frivolous, unreasonable or without foundation. (*People v. Roger Hedgecock for Mayor Com.* (1986) 183 Cal.App.3d 810, 816-19; see also *Community Cause v. Boatwright* (1987) 195 Cal.App.3d 562, 574-77.)

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[5]All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

The Act also provides misdemeanor criminal sanctions for knowing or willful violations of the Act including fines of up to the greater of $10,000 or three times the amount involved. (§ 91000.) Generally, a person convicted of violating the Act cannot be a candidate for elective office nor act as a lobbyist for four years after the conviction. (§ 91002.)

In addition, any person who purposely or negligently causes any other person to commit a violation, or aids and abets in the commission of a violation, may be subject to administrative sanctions. (§ 83116.5; *People v. Snyder* (2000) 22 Cal.4th 304.) There are specific exceptions for government and private attorneys who provide advice to persons with filing responsibilities under the Act. (Cal. Code Regs., tit. 2, § 18316.5.)

Generally, legislators and other elected state officers are exempt from administrative, civil and criminal penalties for violation of the disqualification requirement contained in Government Code section 87100; however, the Legislature adopted limited disqualification requirements for legislators and other elected state officers. These disqualification requirements are subject only to administrative enforcement by the FPPC. (§§ 87102.5-87102.8.)

Persons who violate the gift or honoraria limits set forth in Government Code section 89500 et seq. are subject to a civil action brought by the FPPC for up to three times the amount of the unlawful gift or honoraria. (§ 89521.) Violators are also subject to administrative sanctions, which include fines of up to $5,000 per violation, but are exempt from the civil or criminal penalties contained in section 91000 et seq. (§ 89520.)

The statute of limitations for civil and criminal enforcement actions is four years from the date of violation. (§§ 91000(c) and 91011(b).) The statute of limitations for administrative actions brought by the FPPC is five years from the date of violation. (§ 91000.5.)

The chart which follows briefly describes who has authority to initiate enforcement proceedings under the Act, with respect to each type of proceeding (administrative, civil and criminal).

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ENFORCEMENT AUTHORITY FOR THE POLITICAL REFORM ACT

Type of Enforcement Action	Actions Against State Officials	Actions Against Local Officials
Administrative (§ 83115 et seq.)	The FPPC may impose administrative sanctions.	The FPPC may impose administrative sanctions.
Civil (§§ 91001(b), 91001.5, 91003 et seq.)	The FPPC is the civil prosecutor of state officials. The AG is the civil prosecutor of the FPPC and its employees. If the civil prosecutor fails to act, individual residents may file civil suit.	The DA is the civil prosecutor. The elected city attorney of a charter city may act as a civil prosecutor of violations occurring within the city. If the civil prosecutor fails to act, individual residents may file a civil suit. The DA may authorize the FPPC to file a civil suit whenever an individual resident could file suit.
Criminal (§§ 91001(a), 91001.5)	The AG and the DA have concurrent authority.	The DA has authority. The elected city attorney of a charter city may act as criminal prosecutor of violations occurring within the city.

B. PROSPECTIVE ADVICE

Staff members at the FPPC will provide verbal or written advice on the Political Reform Act to assist officials in avoiding prospective violations of the law. Written advice can usually be obtained within 21 working days. (§ 83114(b); Cal. Code Regs., tit. 2, § 18329.) The FPPC also may adopt formal published opinions. (§ 83114(a); Cal. Code Regs., tit. 2, § 18329.) These opinions usually require two commission hearings and two to six months to adopt.

Formal opinions under section 83114(a) provide the requester with complete immunity from the enforcement provisions of the Act so long as the requester provides the FPPC with all material facts and the official follows the FPPC's advice in good faith. Written advice is not a formal opinion nor a declaration of FPPC policy. Therefore, it may provide only "guidance" to persons other than the requestor. (Cal. Code Regs., tit. 2, § 18329(b)(7).)

Written advice pursuant to 83114(b) provides the requester only with immunity from enforcement actions brought by the FPPC itself, if the requestor committed the acts complained of either in reliance on the FPPC's advice or because the FPPC did not provide advice within section 83114's time limits. (§ 83114(b); Cal. Code Regs., tit. 2, § 18329.) "Informal assistance," as opposed to a formal opinion or written advice, rendered by the FPPC does not provide the requestor with the immunity set forth in either section 83114(a) or (b). (Cal. Code Regs., tit. 2, § 18329(c).)

The FPPC may be contacted in writing at 428 "J" Street, Sacramento, California 95814; by phone at (916) 322-5660; and on-line via the FPPC's website at <http://www.fppc.ca.gov>.

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VI.

CONFLICTS OF INTEREST IN CONTRACTS

Government Code Section 1090 Et Seq.*

A. OVERVIEW

The common law prohibition against "self-dealing" has long been established in California law. (*City of Oakland v. California Const. Co.* (1940) 15 Cal.2d 573, 576.) The present Government Code section 1090[6], which codifies the prohibition as to contracts, can be traced back to an act passed originally in 1851 (Stats. 1851, ch. 136, § 1, p. 522) and has been characterized as "merely express legislative declarations of the common-law doctrine upon the subject." (*Stockton P. & S. Co. v. Wheeler* (1924) 68 Cal.App. 592, 597.)

Frequently amended in its details, the concept of the prohibition has remained unchanged. In fact, this office and the courts often refer to very early cases when discussing possible violations of this fundamental precept of conflict-of-interest law. (See, for example, *Berka v. Woodward* (1899) 125 Cal. 119.)

In 59 Ops.Cal.Atty.Gen. 604 (1976), this office specifically concluded that the Political Reform Act did not repeal section 1090 et seq. "but that the Political Reform Act will control over section 1090 *et seq.* where it would prohibit a contract otherwise allowable under section 1090 *et seq.*"

Section 1090 basically prohibits the public official from being financially interested in a contract or sale in both his or her public and private capacities. In *Thomson v. Call* (1985) 38 Cal.3d 633, 649, the California Supreme Court reiterated the long-standing purpose and framework of section 1090. The purpose of section 1090 is to make certain that "every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, this remedy provides public officials with a strong incentive to avoid conflict-of-interest situations scrupulously." (*Id.* at p. 650.) The Court also stated:

> . . . [T]he principal has in fact bargained for the exercise of all the skill, ability and industry of the agent, and he is entitled to demand the exertion of all of this in his own favor. [Citation.]

(*Id.* at p. 648; see also *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 542.)

*Selected statutory materials appear in appendix G (at p. 167).

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[6] All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

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> It follows from the goals of eliminating temptation, avoiding the appearance of impropriety, and assuring the city of the officer's undivided and uncompromised allegiance that the violation of section 1090 cannot turn on the question of whether actual fraud or dishonesty was involved. Nor is an actual loss to the city or public agency necessary for a section 1090 violation.

(*Thomson v. Call* (1985) 38 Cal.3d at p. 648; emphasis in original; footnote omitted.)

. . . . . .

> In short, if the interest of a public officer is shown, the contract cannot be sustained by showing that it is fair, just and equitable as to the public entity. Nor does the fact that the forbidden contract would be more advantageous to the public entity than others might be have any bearing upon the question of its validity. (*Capron v. Hitchcock* (1893) 98 Cal. 427.)

(*Id.* at p. 649.)

B. THE BASIC PROHIBITION

Section 1090 provides that an officer or employee may not make a contract in which he or she is financially interested. Any participation by an officer or an employee in the process by which such a contract is developed, negotiated and executed is a violation of section 1090. If no contract is involved, or if a contract in which an officer or employee has a financial interest is not ultimately executed, no violation exists. A board member is conclusively presumed to have made any contract executed by the board or an agency under its jurisdiction, even if the board member has disqualified himself or herself from any and all participation in the making of the contract.

The prohibition applies to virtually all state and local officers, employees and multi-member bodies, whether elected or appointed, at both the state and local level. Section 1090 does not define when an official is financially interested in a contract. However, the courts have applied the prohibition to include a broad range of interests. The remote interest exception set forth in section 1091 enumerates specific interests which trigger abstention for board members but which do not prevent the board from making a contract. The interests set forth in section 1091.5 are labeled "non-interests" in that, once disclosed, they do not prevent an officer, employee or board member from participating in a contract.

Generally, any contract made in violation of section 1090 is void and cannot be enforced. In addition, an official who commits a violation may be subject to criminal, civil and administrative sanctions.

C. PERSONS COVERED

Virtually all board members, officers, and employees are public officials within the meaning of section 1090. (*Thomson v. Call*, *supra*, 38 Cal.3d 633 [council member]; *City Council v. McKinley* (1978) 80 Cal.App.3d 204 [council member]; *People v. Vallerga* (1977) 67 Cal.App.3d 847 [county employee]; *People v. Sobel* (1974) 40 Cal.App.3d 1046 [county employee]; *Campagna v. City of Sanger*, *supra*, 42 Cal.App.4th 533; 70 Ops.Cal.Atty.Gen. 271 (1987) [contract city attorney].) Beginning in 1986, section 1090 became applicable to school boards pursuant to Education Code section 35233. Section 1090 also applies to members of advisory bodies if they participate in the making of a contract through their advisory function. (82 Ops.Cal.Atty.Gen. 126 (1999).)

Board members are conclusively presumed to be involved in the making of all contracts under their board's jurisdiction. (*Thomson v. Call*, *supra*, 38 Cal.3d at p. 649.) With respect to all other public officials, it is a question of fact as to whether they were involved in the making of the contract.

The status of consultants is not entirely clear. This office's opinion in 46 Ops.Cal.Atty.Gen. 74 (1965) continues to represent our views concerning the applicability of Government Code section 1090 to consultants and independent contractors. In that opinion, we concluded that a consultant who performed a feasibility study could not compete for the resulting contract. That opinion hinged on our determination that the section 1090 prohibition against conflicts of interest by "officers and employees" applied to consultants and independent contractors exercising judgment on behalf of public entities. We subsequently ratified this decision in 70 Ops.Cal.Atty.Gen. 271 (1987). The particular issue of follow-on contracts by consultants of state agencies has been specifically addressed in section 10365.5 of the Public Contract Code which codifies the result in 46 Ops.Cal.Atty.Gen. 74, *supra*, albeit through a different statutory vehicle.

Independent contractors, who serve in positions that are frequently held by officers, or employees such as city attorneys, have also been subject to section 1090 in the past. (*Campagna v. City of Sanger*, *supra*, 42 Cal.App.4th 533; *People v. Gnass* (2002) 101 Cal.App.4th 1271; 70 Ops.Cal.Atty.Gen. 271 (1987).) It has also been held that Government Code section 1090 applies to a special city attorney retained under contract. Such an attorney is an "officer and agent" of the city. (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 206-207.)

However, in recent years, several trial courts throughout the state have concluded that section 1090 does not apply to consultants and independent contractors because they are not in fact "employees." At least one appellate court has hinted at this possibility as well. (*NBS Imaging Systems, Inc. v. State Bd. of Control* (1997) 60 Cal.App.4th 328, fn.13.) Absent an authoritative appellate court decision, we continue to embrace our interpretation as representing a sound and appropriately broad application of section 1090.

D. PARTICIPATION IN MAKING A CONTRACT

Having determined that a public official is involved, the next issue is whether the decision in question involves a contract which was "made" in his or her official capacity. The use of the term "made" in the statute indicates that a contract must be finalized before a violation of section 1090 can occur. Once a contract is made, section 1090 would be violated if the official had participated in any way in the making of the contract. (See *People v. Sobel, supra*, 40 Cal.App.3d 1046.)

In *People v. Sobel, supra*, 40 Cal.App.3d 1046, 1052, the court outlined the broad reach of section 1090:

> The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests.

In determining whether a decision involves a contract, one should refer to general contract principles. (84 Ops.Cal.Atty.Gen. 34 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).) However, the provisions of section 1090 may not be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose. (*People v. Honig* (1996) 48 Cal.App.4th 289, 314; see also *People v. Gnass,su pra*, 101 Cal.App.4th 1271.) Three situations that were not readily apparent have been analyzed by this office. In 78 Ops.Cal.Atty.Gen. 230 (1995), this office determined that a development agreement between a city and a developer was a contract for purposes of section 1090. (See also, 85 Ops.Cal.Atty.Gen. 34 (2002).) In 75 Ops.Cal.Atty.Gen. 20 (1992), section 1090 was interpreted to prohibit a hospital district from paying the expenses for a board member's spouse to accompany the board member to a conference. The opinion concluded that the board member had a financial interest in the payment of his or her spouse's expenses and that the payment itself constituted a contract. Finally, this office concluded that a certificate of public convenience and necessity from a City to operate an ambulance service is not a contract but rather is in the nature of a license, and therefore is regulatory in nature. The same analysis applies to the rate schedule which regulates the prices that the ambulance company can charge its riders. (84 Ops.Cal.Atty.Gen. 34 (2001).)

Participation in a decision to modify, extend or renegotiate a contract constitutes involvement in the making of a contract under section 1090. In *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, the city entered into a contract for construction and operation of a concession stand on a pier. Later, one of the owners was elected to the city council. Under the contract, the provider had an option to renew the contract and seek an adjustment of rates. The court concluded that exercise of this option would require the city council to affirm the contract and negotiate a rate structure. In so doing, the city would be making a contract within the meaning of section 1090. In 81 Ops.Cal.Atty.Gen. 134 (1998), this office opined that where an existing contract required periodic renegotiation of payment terms, the modification of such terms constituted the making of a contract. Likewise, sending the

payment issue to arbitration or merely allowing the existing terms to continue would also constitute the making of a contract.

With respect to the making of a contract, the court in *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, held that the test is whether the officer or employee participated in the making of the contract in his or her official capacity. The court defined the making of the contract to include preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids. (See also *Stigall v. City of Taft* (1962) 58 Cal.2d 565; *People v. Sobel*, *supra*, 40 Cal.App.3d at p. 1052.)

These, and similar interpretations, make it clear that the prohibition contained in section 1090 also applies to persons in advisory positions to contracting agencies. (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278; *City Council v. McKinley*, *supra*, 80 Cal.App.3d 204.) This is because such individuals can influence the development of a contract during preliminary discussions, negotiations, etc., even though they have no actual power to execute the final contract. However, because advisory boards do not actually enter into contracts, members with a financial interest in a contract may avoid a conflict by merely disqualifying themselves from any participation in connection with the contract. (82 Ops.Cal.Atty.Gen. 126 (1999).)

If an official is a member of a board or commission that actually executes the contract, he or she is conclusively presumed to be involved in the making of his or her agency's contracts. (*Thomson v. Call*, *supra*, 38 Cal.3d at pp. 645, 649.) This absolute prohibition applies regardless of whether the contract is found to be fair and equitable (*Thomson v. Call*, *supra*, 38 Cal.3d 633; *People v. Sobel*, *supra*, 40 Cal.App.3d 1046) or the official abstains from all participation in the decision. (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201.)

Where the contract is not under the jurisdiction of the board member, the contract is not automatically prohibited by section 1090. (See, 81 Ops.Cal.Atty.Gen. 274 (1998) [where contracts of County Housing Authority Commission were independent from the County Board of Supervisors and consequently could employ a member of the board of supervisors as its executive director]; 85 Ops.Cal.Atty.Gen. 87 (2002) [where a city council member could contract with joint powers authority because it was independent of its city council members]; 21 Ops.Cal.Atty.Gen. 90 (1953) [where contracts of the City Treasurer were not under the supervision or control of the city council]; 3 Ops.Cal.Atty.Gen. 188 (1944) [where a head Court House gardener who owned a private nursery was not disqualified from selling nursery supplies to the county of which he was an employee because of the discretion vested in the county purchasing agent]; 17 Ops.Cal.Atty.Gen. 44 (1951) [where a County Supervisor was not precluded from contracting for construction work with a school district since the contracts for school buildings or school construction are let by Boards of School Trustees without control or supervision of the County Board of Supervisors].) The significant fact in each of these opinions is the independent status of the party contracting on behalf of the governmental agency.

In *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, the court held that a member of the board of a special district who applied for and was offered the position of district manager while still serving on the board violated section 1090. Similarly, in 84 Ops.Cal.Atty.Gen. 126 (2001), this office concluded that section 1090 prohibited a community college board of trustees from contracting with a member of the board to serve as a part-time or substitute instructor. In Cal.Atty.Gen., Indexed Letter, No. IL 92-407 (June 2, 1992), the issue concerned whether a water district could enter into an employment contract with a member of the board of trustees on the proviso that the individual would not be paid any compensation until he resigned his position on the board. The board member in question would disqualify himself from any participation in the board's decision. This office concluded that the proposed contract would violate Government Code section 1090 since board members are conclusively presumed to make all contracts made by the district. Once the board member retires, the district may enter into an employment contract with the former board member, so long as no discussions concerning such employment took place between the board member and his or her colleagues or staff prior to the date of retirement. See also Cal.Atty.Gen., Indexed Letter, No. IL 91-210 (February 28, 1991) (in which Government Code section 1090 was interpreted to prohibit a contract between the school district and a member of its governing board to serve as a substitute school teacher). (See also Gov. Code, § 53227 [which prohibits an employee of a local agency from simultaneously serving on the legislative body of the local agency]; Ed. Code, § 35107(b) and 72103(b) [which specifically applies the same prohibition to school and community college employees].) These code sections were enacted in response to *Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311 (in which a hospital employee was permitted to hold office as an elected member of the hospital board of directors).

Where one agency's decision to contract is subject to review and modification by another agency, this office concluded that both agencies were participating in the making of the contract. In 77 Ops.Cal.Atty.Gen. 112 (1994), a city airport commission awarded a contract for the construction of a new airport terminal. The design of the terminal also had to be approved by the city's art commission, and all modifications ordered by the art commission had to be made free of charge to the city. The question posed was whether the contract could be awarded to an architectural firm where a member of the firm simultaneously was a member of the art commission. The opinion concluded that a member of the firm who sat as a member of the art commission would have a financial interest in the contract because each modification ordered by the art commission would impose costs on the architectural firm which could not be recouped from the city. Accordingly, the opinion concluded that the contract could not be awarded to an architectural firm where a member of the firm simultaneously was a member of the art commission.

In *Stigall v. City of Taft, supra*, 58 Cal.2d 565, the court concluded that where a council member had been involved in the preliminary stages of the planning and negotiating process, but had resigned from the council prior to its vote on the contract, the council member had been involved in the making of the contract. In *City Council v. McKinley, supra*, 80 Cal.App.3d 204, 212, the court followed this reasoning and stated:

> [T]he negotiations, discussions, reasoning, planning, and give and take which go beforehand in the making of a decision to commit oneself must

> all be deemed to be a part of the making of an agreement in the broad sense [citation] . . . . If the date of final execution were the only time at which a conflict might occur, a city councilman could do all the work negotiating and effecting a final contract which would be available only to himself and then present the matter to the council, resigning his office immediately before the contract was executed. He would reap the benefits of his work without being on the council when the final act was completed. This is not the spirit nor the intent of the law which precludes an officer from involving himself in the making of a contract.

In 66 Ops.Cal.Atty.Gen. 156 (1983), this office concluded that county employees who proposed that their functions be accomplished through private consulting contracts were barred from contracting with the county to perform such services. This office stated:

> We are told that the persons involved, while employees of the county, and as employees of the county, have provided input in the formulation of the contract. . . . By that participation in the give and take that went into such "embodiments" of the contract as the negotiations, discussions, reasoning, planning, and drawing of plans and specifications, the county employees had the opportunity to, and did bring their influence to bear on the ultimate contract itself. While no fraud or dishonesty may have been involved, we are nonetheless satisfied that in so doing they participated, not in their personal capacities but in their official ones as county employees, in the "making of the contract" within the meaning of section 1090.

(*Id.* at p. 160.)

(See also 63 Ops.Cal.Atty.Gen. 19 (1980) [where county officials were prohibited from bidding on surplus county land at a public auction conducted by the county because of participation in the land sale process in their official capacity].)

In 81 Ops.Cal.Atty.Gen. 317 (1998), this office concluded that a council member could not participate in the establishment of a loan program and then leave office and apply for a loan. In Cal.Atty.Gen., Indexed Letter, No. IL 92-1212 (January 26, 1993), the issue was whether a former planning commissioner could contract with the city to perform consulting services in connection with revisions of the general plan. The policy decisions, including budgetary considerations, were discussed by the commission prior to the former member's resignation. This office's informal opinion concluded:

> In short, the former commissioner was an active participant in the overall city policy decision to "contract-out" much of the general plan revision. Accordingly, he cannot now benefit from such participation. (*Cf.* 66 Ops.Cal.Atty.Gen. 156 [county employees could not propose agreement for consultant services, then resign, and provide such consulting services].)

In *Santa Clara Valley Water Dist. v. Gross* (1988) 200 Cal.App.3d 1363, 1369-1370, the court concluded that participation in a statutorily mandated process in connection with the

sale of property through eminent domain did not constitute involvement in the making of a contract. In that case, a water district initiated eminent domain proceedings against a landowner who was a member of the water district's board of directors. In order to recover litigation expenses, Code of Civil Procedure section 1250.410 requires the parties to file a final demand and offer respectively. Believing they were barred from participating in the demand and offer process by section 1090, the parties failed to file the required documents.

The court concluded that participation in the demand and offer process was mandated by statute and did not violate section 1090, and therefore refused to allow litigation expenses. The court stated:

> Once a condemnation action has been filed, however, the property owner and his agency become adversaries, subject to the rules of court and civil procedure which govern the course of litigation. A settlement achieved pursuant to these rules can be supervised by the court and receive the imprimatur of court confirmation. Government Code section 1090 is directed at dishonest conduct and at ""conduct that tempts dishonor"" (*Thomson v. Call* (1985) 38 Cal.3d 633, 648 [214 Cal.Rptr. 139, 699 P.2d 316]); it has no force in the context of a condemnation action where the sale of property is accomplished by operation of law and each side is ordinarily represented by counsel.
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> . . . . . .
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> The Legislature [in § 1250.410] did not direct the parties to "apprise" each other or "communicate" with each other about an offer or demand. (*City of San Leandro v. Highsmith, supra*, 123 Cal.App.3d 146, 155.) Rather it directed that each file with the court, and serve upon the other, a formal offer and demand, as an absolute prerequisite to an award of attorney's fees. This procedure is not the equivalent of negotiations between the parties and consequently does not run afoul of section 1090.

(*Santa Clara Valley Water Dist. v. Gross, supra*, 200 Cal.App.3d at pp. 1369-1370.)

Absent these or similar special procedures, a board may not enter into settlement negotiations with a board member with whom it is in litigation. This office concluded in opinion 86 Ops.Cal.Atty.Gen. 142 (2003) that a settlement agreement resolving litigation, involving issuance of a development permit, between a district and one of its board members would violate section 1090.

When an employee, rather than a board member, is financially interested in a contract, the employee's agency is prohibited from making the contract only if the employee was involved in the contract-making process. So long as the employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee's duties or because the employee has disqualified himself or herself from all such participation) the employee's agency is not prohibited from contracting with the employee or the business entity in which the employee is interested.

In 80 Ops.Cal.Atty.Gen. 41 (1997), firefighters were permitted to sell a product, which they invented in their private capacity, to their fire department so long as they did not participate in the sale in their official capacity. In 63 Ops.Cal.Atty.Gen. 868 (1980), a real estate tax appraiser could purchase property within the county at a tax-deeded land sale where he did not participate in or influence the appraisal. (See Cal.Atty.Gen., Indexed Letter, No. IL 73-146 (August 29, 1973) [regarding state employee]; but see Pub. Contract Code, § 10410 [prohibiting contracts between state employees and state agencies]; see also Chapter VII of this pamphlet.)

E. PRESENCE OF REQUISITE FINANCIAL INTEREST

For section 1090 to apply, the public official in question must have a financial interest in the contract in question. Although the term "financial interest" is not specifically defined in the statute, an examination of case law and the statutory exceptions to the basic prohibition indicate that the term is to be liberally interpreted. In 85 Ops.Cal.Atty.Gen. 34 (2002), this office concluded that the definitions of the remote and noninterest exceptions should be consulted for guidance to determine what falls within the scope of the term "financial interests" as used in section 1090.

In *Thomson v. Call, supra*, 38 Cal.3d 633, 645, the court stated that the term financial interest included both direct and indirect interests in a contract. As an example of an indirect interest, the court cited *Moody v. Shuffleton* (1928) 203 Cal. 100, in which a county supervisor sold his business to his son in return for a promissory note secured by the business. Because the business helped to secure the value of the official's mortgage, a conflict existed when county printing contracts were awarded to the son. The court also stated that an official who was a stockholder in a corporation had an indirect interest in the contracts of the corporation.

Although special statutory exemptions may negate the full effect of the section 1090 prohibition, the following economic relationships generally constitute a financial interest: employee of a contracting party; attorney, agent or broker of a contracting party; supplier of services or goods to a contracting party; landlord or tenant of a contracting party; officer or employee of a nonprofit corporation which is a contracting party.

Prior to 1963, section 1090 applied to all interests, not merely financial ones. However, since most reported cases prior to 1963 involved financial interests, these older cases still represent viable interpretations of the law. Even where these cases do not involve a financial interest, they are still instructive on the issue of whether there is a sufficient connection between the contract and the interest held by the official in order to bring the transaction under the coverage of the prohibition.

In *People v. Deysher* (1934) 2 Cal.2d 141, 146, the court stated that:

> 'However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void.'

(See also *People v. Honig, supra,* 48 Cal.App.4th at p. 315.)

The court went on to say that section 1090 attempted to prohibit any measure of duality in contractual situations because officials, as trustees of the public, may not exploit their public positions for private benefits. In *Stigall v. City of Taft, supra,* 58 Cal.2d 565, 571, the court stated:

> The legislation with which we are here concerned seeks to prohibit a situation wherein a man purports to deal at arm's length with himself and any construction which condones such activity is to be avoided.

In *People v. Gnass, supra,* 101 Cal.App.4th 1271, 1298, the court indicated that:

> [T]he certainty of financial gain is not necessary to create a conflict of interest. '[T]he object of the [statute] is to remove or limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision. . . .' (*Stigall v. City of Taft, supra,* 58 Cal.2d at p. 569.) 'The government's right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty.'(*Honig, supra,* 48 Cal.App.4th at p. 325.)

In 86 Ops.Cal.Atty.Gen. 187 (2003), this office concluded that there was no "reach-back period" (such as the 12-month period for income under the Political Reform Act) within the context of section 1090. There the financial interest in question was that of a supplier of goods or services, but the discussion regarding the "termination" of the interest would appear to apply to an employer or other source of income as well. The opinion concluded that only during the pendency of the business relationship was there a financial interest from which the official might benefit directly or indirectly. However, if the business relationship were not terminated in a manner that removed "the possibility of any personal influence, either directly or indirectly" the prohibition of section 1090 would remain in effect.

Below is a discussion of several decisions and opinions in which the public officials in question have possessed the requisite financial interest.

Complex multi-party transaction -- In the 1985 California Supreme Court case of *Thomson v. Call, supra,* 38 Cal.3d 633, the court found that a complex multi-party transaction involving the sale of property from a city council member through an intermediary corporation to the city constituted a violation of section 1090. The corporate intermediary obtained the land to convey to the city for use as a park and the corporation was to be issued a use permit for construction of a high-rise building on adjacent property. If the corporation failed to obtain the council member's property, the corporation was to pay to the city a sum of money with which it could acquire the land through eminent domain. Had there been no discussions between the city and the corporation regarding the property to be acquired for the park prior to the corporation's acquisition of the council member's property, the section 1090 prohibition might not have been invoked. However, in *Thomson,* the court found that the purchase by the corporation of the council member's land was part of a pre-arranged

agreement with the city. Under these circumstances, the court concluded that the city council member was financially interested in the contract that conveyed the land to the city.

Shareholder insulated from contract payments -- In *Fraser-Yamor Agency, Inc. v. County of Del Norte, supra*, 68 Cal.App.3d 201, the court concluded that a public official, who was a shareholder in an insurance brokerage firm, had a financial interest in the firm despite the creation of a financial arrangement which would assure that payments under an insurance contract with a county would not be used to pay the shareholder's compensation or the business expenses of the brokerage firm. The court concluded that the volume of business to the firm affected the value of the interested official's investment in the firm. Thus, to the extent that the firm benefitted by increased business, so did the official, despite the fact that the benefit was in some way indirect. (The court indicated that it did not have enough evidence to determine whether the interest was remote.)

In 84 Ops.Cal.Atty.Gen. 158 (2001), this office reached a similar conclusion. There, a city councilman owned 48 percent of the shares of an architectural corporation, with the remaining shares owned by three other licensed architects. The architectural corporation also leased its premises from the councilman. Under these circumstances, one of the other three architects may not establish a separate firm for the purpose of contracting with the city to provide architectural services utilizing the corporation's premises, employees, and equipment even if the corporation would bill the firm for its pro rata share of the rent, employees' services, and use of equipment, and the corporation would not share in the profits of the firm from the city's contracts. Under these circumstances, the opinion concluded that the financial identity between the corporation and the separate firm would be too pervasive to allow such contracts and the corporation would likely benefit indirectly from the city's business.

In 86 Ops.Cal.Atty.Gen. 138 (2003), this office was asked whether it would violate section 1090 for a city council to enter into a contract with a law firm, of which a city council member is a partner, to represent the city in a lawsuit. Under the proposed agreement, the law firm would not receive any legal fees and would bear all litigation expenses normally borne by the client. The opinion pointed out that this arrangement could give rise to potentially significant costs to the firm. In these circumstances, the city's interests and the firm's interests might diverge. For example, the city might wish to litigate swiftly and aggressively, using the firm's best qualified senior attorneys and pursuing an elaborate discovery plan. The law firm, on the other hand, might wish to minimize its costs at the outset of the litigation and spread them over a longer period of time. Also, depending upon such factors as staff salaries, overhead, and the needs of its other clients, the law firm might prefer to assign fewer attorneys to the city's case and engage in less discovery. Depending upon initial court rulings, it might be in the interests of the law firm to enter into settlement negotiations which might not be in the best interests of the city.

The contract could also bring indirect economic gain to the law firm in that success in the litigation could be financially advantageous to the law firm and inure to the council-member's personal benefit by enhancing the value of his interest in the firm. Accordingly, the opinion concluded that the council member had a financial interest in the contract and that such an arrangement would violate section 1090.

Contingent payment -- In *People v. Vallerga, supra*, 67 Cal.App.3d 847, the court found that a county employee had a financial interest in a contract where his private consulting contract was contingent upon the execution of the county's contract with the city. The court found that the requisite financial interest existed where the contracting entity is in a position to render actual or potential pecuniary gain to the official by virtue of the award of the contract.

Primary shareholder in contracting party -- In *People v. Sobel, supra*, 40 Cal.App.3d 1046, section 1090 was applied to remedy a classic self-dealing situation. There, a city employee, involved in purchasing books, awarded contracts to a corporation in which, unknown to the city, he and his wife were the primary shareholders.

Creditor-debtor relationship -- In *People v. Watson* (1971) 15 Cal.App.3d 28, the court concluded that a creditor-debtor relationship constituted a financial interest within the meaning of section 1090. (See also *Moody v. Shuffleton, supra*, 203 Cal. 100.) The defendant was a harbor commissioner whose corporation had loaned money to a corporation which subsequently was attempting to negotiate a lease with the commission. While the loan was still outstanding, defendant voted as a commissioner to approve the proposed lease, thereby violating section 1090.

Spousal property -- An official also has an interest in the community and separate property income of his or her spouse. (*Nielsen v. Richards* (1925) 75 Cal.App. 680; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655.) In 78 Ops.Cal.Atty.Gen. 230 (1995), this office concluded that a city council member had a financial interest in a development agreement where the council member's spouse was a partner in a law firm that represented the contracting developer on matters unrelated to the contract. Since the spouse's property is attributed to the official, exemptions which would be applicable if the official possessed the interest directly are also attributed to the spouse's property. (See section I of this Chapter for a discussion of remote interests.)

In 85 Ops.Cal.Atty.Gen. 34 (2002), this office concluded that where a city proposed to enter into a development agreement with a developer, a senior staff member of the city may not participate in the negotiating and drafting of the development agreement where the staff member's spouse is employed by a consulting firm that provides outreach services to the developer on a yearly retainer even though the spouse has no ownership interest in the firm, he will not work on the city's project, and his income will not be affected by the outcome of the development agreement or project. The spouse of the city staff member was one of the people in the consulting firm that provided services to the developer. As a result, the spouse, and hence the public employee, was found to have a financial interest in the contract by virtue of being a supplier of services to the contracting party.

In 69 Ops.Cal.Atty.Gen. 255 (1986), this office discussed remote interest and the application of the exemption in section 1091.5(a)(6) to a school board member and a teacher who were married. (See 65 Ops.Cal.Atty.Gen. 305 (1982) [regarding an interested superintendent's participation in labor negotiations]; see also section J, subsection (6) of this chapter for further discussion.)

In 69 Ops.Cal.Atty.Gen. 102 (1986), this office discussed participation of a school board member in a collective bargaining agreement with the union which represented the member's spouse who was a tenured teacher.

In 75 Ops.Cal.Atty.Gen. 20 (1992), section 1090 was interpreted to prohibit a hospital district from paying the expenses for a board member's spouse to accompany the board member to a conference. Just as a board may not employ a director's spouse without violating section 1090, neither may it pay the travel expenses of a director's spouse. The opinion further concluded that there was no direct and substantial public purpose to be served by paying the travel and incidental expenses of a director's spouse. Therefore, payment of such expenses would also represent an unconstitutional expenditure of public funds. (See also 84 Ops.Cal.Atty.Gen. 131, 132, fn. 2 (2001); 81 Ops.Cal.Atty.Gen. 169, 171-172 (1998).)

Public officers to receive commission -- In 66 Ops.Cal.Atty.Gen. 376 (1983), this office concluded that the terms of the compensation package for the city attorney and other city personnel made them financially interested in all land development contracts to which the city was a party. Compensation for these officials was tied to increases in land value, based on the approval of land developments. The opinion pointed out that in approving land developments, a number of policy issues, aside from land value, must be considered, e.g., the ratio between commercial and residential development, density factors, etc. In basing compensation solely on land values, there was an incentive to consider only land value factors.

Employee of contract provider -- In 58 Ops.Cal.Atty.Gen. 670 (1975), this office advised that a local mental health director was in violation of section 1090 where he also was employed by the contract provider of mental health services to the county. In his official position, he was required to advise the county board of supervisors regarding contracts for mental health services, and in his private capacity he received a fixed yearly salary from the contract provider. Thus, he was interested in the county's contracts for mental health services in both his public and private capacities.

F. TEMPORAL RELATIONSHIP BETWEEN FINANCIAL INTERESTS AND THE CONTRACT

The essence of the 1090 prohibition is to prevent self-dealing in the making of public contracts. In determining whether self-dealing has occurred, the timing of events may be crucial. Factors such as the date that the official assumed or resigned from office, the date the contract was executed and the duration of the contract are important and may prove to be dispositive.

Thus, an official who has contracted in his or her private capacity with the government before the official is elected or appointed does not violate the section, and the official may continue in his or her position as such contracting party for the duration of that contract. The official's election or appointment does not void it. (*Beaudry v. Valdez* (1867) 32 Cal. 269; 85 Ops.Cal.Atty.Gen. 176 (2002); 84 Ops.Cal.Atty.Gen. 34 (2001).) However, when the

time comes for the contract to be extended, amended or renegotiated, the official faces a new set of problems.

In the case of a board member, the official must resign from office or eliminate the private interest to avoid the proscription of section 1090. (*City of Imperial Beach v. Bailey*, *supra*, 103 Cal.App.3d 191; *Finnegan v. Schrader*, *supra*, 91 Cal.App.4th 572; see also Cal.Atty.Gen., Indexed Letter, No. IL 92-407 (June 2, 1992); Cal.Atty.Gen., Indexed Letter, No. IL 75-170 (July 29, 1975).) A new contract between the board member and the city, county or district, which the board member represents, may not be executed. (But see Pub. Contract Code, §§ 10410, 10411 [regarding state employees discussed in Chapter VII of this pamphlet].)

However, simply resigning a public post may not cure a conflict in all situations. Timing is essential. In *Stigall v. City of Taft*, *supra*, 58 Cal.2d 565, the court ruled that a public official may not resign from office at the last minute in order to take private advantage of a contract where the official had participated in the formation of the contract in his or her public capacity. In that case, a city council member owned a plumbing business which was awarded a plumbing subcontract in connection with construction of a city civic center. The official had taken part in the planning, preliminary discussions, compromises, drawing of plans and specifications, and solicitation of bids for the civic center project. The court held that this council member had participated in the "making" of the contract within the meaning of section 1090, even though the official resigned from office before the contract was finally awarded. (See *City Council v. McKinley*, *supra*, 80 Cal.App.3d 204; 66 Ops.Cal.Atty.Gen. 156 (1983); 81 Ops.Cal.Atty.Gen. 317 (1998); Cal.Atty.Gen., Indexed Letter, No. IL 92-1212 (January 26, 1993).)

Since board members are conclusively presumed to have made all contracts under their jurisdiction, it is possible that a court could conclude that a board member had, as a matter of law, participated in the making of any contract, the planning for which had been commenced during the board member's time in office.

In the case of an employee, a contract may be renegotiated, so long as the employee totally disqualifies himself or herself from any participation, in his or her public capacity, in the making of the contract. When a contractor serves as a public official (e.g., a city attorney) renegotiates a contract, this office recommends that such contractors retain another individual to conduct all negotiations. In so doing, the official would minimize the possibility of a misunderstanding arising concerning whether the contractor's statements were made in the performance of the contractor's public duties or in the course of the contractual negotiations. However, in the absence of special circumstances, the fact that a contract city attorney's advice to initiate or defend litigation would increase the amount of payments under an existing contract, generally would not violate section 1090.

G. EFFECT OF SPECIAL STATUTES

Some statutes may contain special provisions which alter or eliminate the general rule set forth in section 1090 in a specific situation. For example, Education Code section 35239